FILED
AUG 29 1955
HAROLD B. WILLEY, Clerk

No. 179.

IN THE

Supreme Court of the United States

October Term, 1955.

DAVID H. MITCHELL, *Petitioner*,

vs.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR PETITIONER.

PHINEAS ROSENBERG,
HOWARD F. SACHS,
620 R. A. Long Building,
Kansas City, Missouri,
HARLOW B. KING,
1009 Commerce Building,
Kansas City, Missouri,
Attorneys for Petitioner.

MORELOCK, HOSKINS & KING,
Of Counsel.

R. L. MENDENHALL, INC., 924 WYANDOTTE, KANSAS CITY, MO., HARRISON 3080

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ARGUMENT.

January 10, 1955, this Court vacated judgment in this case, for reconsideration "in the light of *Holland* v. *United States*, 348 U. S. 121 * * *." *Mitchell* v. *United States*, 348 U. S. 905. Neither the Court of Appeals in its opinion (Pet. 21) nor the Government in its brief in opposition has complied with this direction.

The strikingly relevant portion of the net worth cases is contained in *Holland* (l. c. 137-138), relating to the Government's burden to prove the taxable source of net worth increases. This burden of proving source makes necessary certain instructions to the jury, also relevant to this case.

Even before *Holland* clarified the law nationally and threw a spotlight on the issue of taxable source, petitioner challenged the Government's proof on this point. In his original brief in the Court of Appeals, he stated (l. c. 38), "There is no evidence of a source of income to appellant which could account for such large-scale increases, and no proof to negative (non-taxable sources)." In his original petition for certiorari in No. 622, O. T. 1953, he stated (l. c. 5), "(The Government) offered no evidence relative to the source of the increases claimed by it * * *." Subsequently to *Holland*, in his brief in the Court of Appeals (l. c. 7-16), and in his petition for certiorari (l. c. 8-11), petitioner probed the record in support of these statements. With four opportunities to answer, the Government has failed to specify any theory as to taxable sources, or to cite from the record any proof of source for the unexplained net worth increases; nor has the Court of Appeals hazarded a statement on this subject.

In its brief in opposition in No. 622, O. T. 1953, the Government admitted (l. c. 9), "The Revenue Agent who had conducted the investigation stated that he did not know the source of the additional income shown by the net worth computation over and above (the) specific items (R. 26-27)." After four opportunities have passed, it is apparent that the Government knows no more concerning source than does its agent, and that the record contains no testimony from which a trier of fact could determine that the net worth increases came from a taxable source. In its latest brief the Government merely complains (l. c. 4) that it is "difficult to tract the exact source of the petitioner's income." It is essentially undisputed that the Government has failed to prove taxable source, and has thereby failed to satisfy the test stated in *Holland*.

The procedural smokescreen by which the Government seeks to cover its failure of proof, and the failure of the trial court to give instructions in compliance with the new rules established by *Holland*, was anticipated and answered in the petition (l. c. 13-17). What could not be anticipated was the Government's continuing refusal to discuss the merits, and to give practical application to the rules set forth in *Holland*.

In its brief the Government suggests (l. c. 6) that apart from the net worth case the verdict might be sustained by reason of the secondary theory of prosecution, based on specific items of alleged unreported income. The Court of Appeals likewise relied upon this supposed safety net (Pet. 23). The position is legally unsound, under the authorities cited in the petition for certiorari (l. c. 14, point (3)). Petitioner conceives that the Government and court below failed to consider that affirmance on a different *factual* ground, or speculation as to the result if the trier had been limited to a particular set of facts, would amount to substituting an appellate review for a properly guided trial by jury.

Relative to instructions, the Government again does not directly defend the net worth instructions actually given, which treated net worth increases as synonomous with income, without requiring a finding of taxable source. Because some specific omissions were conceded by petitioner's evidence, and were fully explained (in most cases to the satisfaction of the jury, as demonstrated by the acquittal for 1949 and 1950), certainly does not relieve the Government of its obligation to prove the large net worth increases for 1945-1948 were unreported income, and does not relieve the jury from finding taxable source.

Petitioner went beyond his legal obligation and produced evidence which explained the net worth figures for

1949 and 1950 as omitted income resulting from bookkeeping errors, which the jury found to be innocent. Because of a different bookkeeping system in the earlier years, the accountant was unable to make a similar computation and direct reconstruction of financial changes during 1945-1948 (R. 55, 47-50). It is significant that the jury acquitted for the years in which the net worth increases were explained by petitioner, and convicted petitioner for the years for which there was no explanatory testimony. This clearly shows that the jury mistakenly placed the burden on petitioner to explain the net worth increases, ignoring the presumption of innocence and the *Holland* rule that the Government must first prove taxable source, and thus unreported income for the years in question, before "the defendant remains quiet at his peril." (l. c. 138-139). The judgment stands as an existing violation of the *Holland* decision.

For reasons herein and heretofore stated, granting this petition for certiorari will permit reversal of a conviction obtained erroneously and without compliance with the rules announced by this Court, and will further permit the firm establishment of the *Holland* decision as the law of the land.

Respectfully submitted,

PHINEAS ROSENBERG,
HOWARD F. SACHS,
HARLOW B. KING,
Attorneys for Petitioner.

MORELOCK, HOSKINS & KING,
Of Counsel.

August, 1955.

FILED
NOV 3 1955
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PETITION FOR REHEARING.

PHINEAS ROSENBERG,
HOWARD F. SACHS,
620 R. A. Long Building,
Kansas City, Missouri,
HARLOW B. KING,
1009 Commerce Building,
Kansas City, Missouri,
Attorneys for Petitioner.

MORELOCK, HOSKINS & KING,
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E. L. MENDENHALL, INC., 924 WYANDOTTE, KANSAS CITY, MO., HARRISON 3030

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PETITION FOR REHEARING.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 58, and for the purpose of obtaining a rehearing of this Court's action, October 10, 1955, in denying his petition for a writ of certiorari, petitioner herewith presents additional grounds for granting a writ of certiorari, not previously presented in this proceeding, as follows:

(1) Submission of net worth case to jury, on presumption that net worth increases arose from taxable sources,

without proof establishing taxable sources, violated presumption of innocence and shifted burden of proof in violation of Due Process clause of Fifth Amendment.

(2) Cumulative errors at trial prevented fair trial and violated Due Process clause of Fifth Amendment.

(3) Failure of Court of Appeals to apply principles of law announced by this Court in *Holland* v. *United States*, 348 U. S. 121, constituted such unjustifiable discrimination as to violate Due Process clause of Fifth Amendment.

(4) A new decision by the Court of Appeals for the Ninth Circuit, supporting the ruling below, expressly recognizes conflict between appellate courts and inconsistency with this Court's decisions as to whether review is *discretionary* or *absolutely forbidden* relative to plain errors committed at trial which were not brought to the attention of the trial court.

(1) Presumption of Taxable Sources—Constitutional Considerations.

The factual and introductory legal contentions upon which this point is based are covered in the Statement and at pages 8-13 of the petition for certiorari. Summing them up, it is clear from this record that petitioner was convicted in an income tax prosecution primarily based on the net worth method, without a scintilla of proof as to the source or likely source of the net worth increases shown by the Government's evidence for the years for which petitioner was convicted, by a jury which was led to disregard the issue of source or likely source by Government argument and by instructions from the trial court which permitted and directed consideration and treatment of net worth increases as taxable income, in the absence of disproof by petitioner of their taxable nature. There can be

no question in the instant case but that the burden of proof as to source was improperly shifted to petitioner, a criminal defendant, and that the presumption of innocence as to said crucial matter was violated.

In the petition for certiorari no express reference was made to the Constitutional aspects of this denial of petitioner's rights, as it was considered unnecessary in such an appropriately brief presentation to delve so deeply into the nature of the error committed herein. Reference to the petition for certiorari in No. 622, O. T. 1953, at pages 13-14, and to pages 41-43 in his first brief in the Court of Appeals, indicates that petitioner has been fully aware of the Constitutional consideration, and that it is considerably more than an afterthought.

The shifting of the burden of proof and the arbitrary presumption of guilt upon which the prosecution rested its case violated petitioner's Constitutional rights, which this Court has ruled may not be tampered with by the Congress (*Tot* v. *United States*, 319 U. S. 463), or the courts (*Krulewitch* v. *United States*, 336 U. S. 440, 457; *Morissette* v. *United States*, 342 U. S. 246, 275).

(2) Cumulative Error—Constitutional Considerations.

The basic error relative to proof and presumptions regarding the source of net worth increases discussed above did not stand alone. Equally or more misleading with the jury was the Governmentally induced confusion of market with cost valuations, under which net worth increases obtained by comparing net worth statements prepared or admitted by the petitioner, and which actually showed more than $150,000 in unrealized market value increases, were erroneously treated by the trial court as devastating ad-

missions of unreported income (R. 9, 11-14, 29-41, 63, 71-72, 121). In addition thereto, prejudicial hearsay was permitted in cross-examination by the Government of its own witnesses, under a claim of surprise, disproved by the record (R. 16-20); the trial court erroneously charged the jury that petitioner's evidence was legally "negative" and thereby "weak" (R. 73); and the Government's argument went outside the record (R. 64), mis-stated a ruling by the trial court (R. 65), improperly dealt in personalities (R. 58, 60), impliedly referred to petitioner's failure to testify (R. 61, 62), and mistakenly stated that negligence of third parties is not a defense to charge of tax evasion (R. 65).

Without attempting at this time to develop in full each of the above matters, petitioner relies here on the cumulative effect of said errors, believing that "the combination of these * * * errors was sufficiently prejudicial to require reversal." *Gordon* v. *United States,* 344 U. S. 414, 422. While considering that certain of said errors alone were fatal to the fairness of the proceeding, and deprived the trial of the basic soundness of procedure guaranteed under the Fifth Amendment, certainly the accumulation of such errors prevented the achievement of Due Process. Compare *Buchalter* v. *New York,* 319 U. S. 427; *Stroble* v. *California,* 343 U. S. 181.

(3) Failure to Apply Holland—Constitutional Considerations.

The failure of the Court of Appeals to follow the directives of this Court and the new rules relative to proof and instructions in net worth cases, particularly respecting the *source* of net worth increases, are developed in the Statement and at pages 7-13 of the petition for certiorari. Under the rules of this Court, repetition of such argument would be improper and unnecessary, but understanding thereof is a necessary basis for the point herein made.

Whether considered as a refusal to apply general law, declared by this Court, to petitioner individually or a refusal by one appellate court to enforce law generally applicable throughout the country, it is contended that the Court of Appeals has created "discrimination * * * so unjustifiable as to be violative of due process." *Bolling* v. *Sharpe*, 347 U. S. 497, 499. Compare *Boykin* v. *Huff*, C. A. D. C., 121 F. 2d 865, 872.

The only possible justification for discriminatory classification, and the failure to apply the principles established by *Holland*, would be procedural distinctions. Such distinctions were considered by petitioner at pages 13-17 of his petition, and were there disposed of.

Even if "doubts of a philosophical nature" may be conscientiously suppressed by refusing to apply subsequent judicial decisions to *closed* criminal cases (*Collins* v. *Webb*, U. S. D. C. Cal., 133 F. Supp. 877), under the decisions cited in the petition for certiorari (l. c. 15), and under the express direction of this Court that *Holland* should be applied to the instant case (*Mitchell* v. *United States*, 348 U. S. 905), the Court of Appeals' actual refusal to apply said principles is arbitrary and violative of due process; nor is the decision saved by that Court's polite reference to *Holland* (Petition 25). Petitioner cannot believe that this Court's vacation of judgment for reconsideration may be so lightly satisfied, when analysis unmistakably calls for a new trial.

(4) New Decision Requiring Consideration of Rule 52(b).

Rule 52(b), Federal Rules of Criminal Procedure, states, "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." In the case at bar, however, the Court of Appeals denied that it had even a *discretionary* power to review the sufficiency of evidence or instructions

to the jury, in the absence of objection below (Petition 23, 25). Petitioner adopts without repetition herein his arguments and authorities contained at pages 13-15 of the petition, and relies herein on a new decision relevant thereto, which, in his opinion, requires the attention of this Court.

October 11, 1955, the Court of Appeals for the Ninth Circuit, brought to a climax the conflict within the appellate courts on this point. *Herzog* v. *United States*, C. C. H. Standard Federal Tax Reporter '55, vol. 5, #9694. Agreeing with, and citing a leading case from the Eighth Circuit which was also cited in the instant case, the author of the *Herzog* opinion stated that Rule 52(b) allows no discretion to appellate courts to review errors below, absent objections below. He ruled, "There is no distinction made for 'grave error,' 'fundamental error,' 'slight error' or any other kind of error. If there is a failure to except to an instruction the appellate courts are foreclosed from reviewing the question."

In so ruling, consistently with the Court of Appeals in this case, the panel of judges deciding *Herzog* recognized that their decision overruled *Bloch* v. *United States*, (C. A. 9) 221 F. 2d 786, and further held that the relevant points in the decisions of this Court, *Screws* v. *United States*, 325 U. S. 91, 107, and *United States* v. *Atkinson*, 297 U. S. 155, "have not been the law since the Federal Rules of Criminal Procedure became effective March 21, 1946."

The *Herzog* decision, other appellate decisions cited therein insofar as they support said decision, and the case at bar are clearly in error in denying the discretionary power contained in Rule 52(b). The decisions of this Court claimed to have been overthrown by the Federal Rules of Criminal Procedure still stand. The *Herzog* opinion failed to examine the Advisory Committee Notes relating to Rule

52(b) which state, "This rule is a restatement of existing law" citing *Wiborg* v. *United States*, 163 U. S. 632, 658, in which this Court held, with reference to a failure to object to error at trial, "although this question was not properly raised, yet if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it."

The issue is of the greatest importance in the administration of justice. It is whether Federal trial judges have a reviewable responsibility, independent of trial counsel, to prevent "plain error affecting substantial rights" of criminal defendants; whether, for instance, there are circumstances when "the trial judge should have stopped counsel's discourse without waiting for an objection." *Viereck* v. *United States*, 318 U. S. 236, 248. *Herzog* and *Mitchell* directly contradicting this Court's ruling in *Wiborg*, *supra*, hold that appellate courts "are *not* at liberty" (Pet. 25) to review such errors, however plain, flagrant, and prejudicial. It will require a decision of this Court to restore meaning to Rule 52(b), to restore confidence in the above-cited decisions of this Court, and to prevent absolute foreclosure of defendants' rights because of claimed omissions by trial counsel.

In conclusion, we wish to inform the Court that the attorneys for defendant in *Herzog* advise that if their petition for rehearing *in banc* is denied by the Court of Appeals for the Ninth Circuit, they propose to petition for certiorari in this Court.

CONCLUSION.

For the reasons herein stated, and for the reasons previously set forth in this proceeding, petitioner respectfully urges the Court to grant a rehearing, vacate its denial of certiorari, and grant a writ of certiorari.

Respectfully submitted,

PHINEAS ROSENBERG,
HOWARD F. SACHS,
HARLOW B. KING,
Attorneys for Petitioner.

November, 1955.

CERTIFICATE OF COUNSEL.

The undersigned attorney for petitioner hereby certifies that the above petition for rehearing is presented in good faith and not for delay, and is restricted to substantial and controlling intervening circumstances and to substantial grounds available to petitioner although not previously presented, and to the examination of the same.

HOWARD F. SACHS,
Attorney for Petitioner.